Supreme Court, U. S.
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No. 75-519

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES W. JAMIESON, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS AND MEMORANDUM FOR THE APPELLEE IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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Appellants seeks review of a decision of a court of appeals in a federal income tax case. However, he does not draw into question the constitutionality of any federal statute as required by 28 U.S.C. 2101(a). Accordingly, the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari under 28 U.S.C. 2103, the petition should be denied.

Appellee claims that the courts below erred in disallowing: (1) a theft loss deduction for 1968; (2) various itemized deductions instead of the $500 standard deduction; and (3) an additional personal exemption for his wife on his separate tax return for 1968. The Tax

Court upheld the Commissioner's deficiency and the court of appeals affirmed in an unpublished *per curiam* order (Pet. App. B).[1]

1. It is well established that a theft loss is deductible only in the year in which the loss is discovered unless there exists a reasonable prospect of recovery in that year. In that event, the loss is deductible in the year the prospect of recovery ceases to exist. Section 165(e) of the Internal Revenue Code of 1954; *Parmelee Transportation Co.* v. *United States,* 351 F.2d 619, 627-629 (Ct. Cl.); Treasury Regulations on Income Tax (1954 Code), Section 1.165(d)(3) (26 C.F.R.). here, appellant discovered his alleged theft loss in 1966, and there was a reasonable prospect of recovery until 1972 (Pet. App. A 3). Thus, the courts below correctly held that appellant was not entitled in 1968 to a deduction for his alleged loss.

2. Appellant further urges (Pet. 2, 9) that his allowable itemized deductions for 1968 exceeded the $500 standard deduction allowed by the Commissioner. However, the record shows that there was no allowable theft loss deduction in 1968 (Pet. App. A 3) and that the majority of appellant's legal costs were not deductible in 1968 because he paid them in other years (Tr. 16-17, 26-27; Treasury Regulations on Income Tax (1954 Code), Section 1.461-1(a)(1) and (3)(i) (26 C.F.R.)). Thus, the courts below correctly held that appellant was limited to the $500 standard deduction in lieu of his claimed itemized deductions since the remaining deductions were less than the standard deduction.

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[1]The Tax Court also granted the Commissioner's motion to dismiss the petition with respect to the year 1969 for lack of jurisdiction because the notice of deficiency did not include 1969 (Tr. 4, 29-32; Docket Entries, p. 2).

3. Appellant also asserts (Pet. 2, 7-8) that he was entitled to an additional personal exemption for his wife on his 1968 return because she was more than 65 years old. But a married taxpayer filing a separate tax return cannot claim any exemption for his spouse if the spouse had any gross income during the taxable year. Section 151(b) of the 1954 Code; *Jamieson* v. *Commissioner,* 353 F. 2d 1 (C.A. 7). Here, appellant's spouse not only had gross income in 1968 but she filed a separate return for that year in which she claimed both the "regular" and "65 or over" exemption for herself (Pet. App. A 3; Tr. 22; Ex. I).[2] Thus, appellant could not claim any exemption for his wife.[3]

For the reasons stated, it is respectfully submitted that the appeal should be dismissed or alternatively that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[2]Nor is appellant entitled to claim an exemption for his spouse as a dependent since Section 152(a)(9) excludes a spouse from the statutory definition of dependent for purposes of an exemption under Section 151(e). See *Dewsbury* v. *United States,* 146 F. Supp. 467 (Ct. Cl.); Rev. Rul. 55-325, 1955-1 Cum. Bull. 18.

[3]The courts below also correctly held that the Tax Court properly dismissed appellant's suit for 1969 because no deficiency notice had been issued for 1969 at the time the petition was filed in the Tax Court. Thus, the Tax Court had no jurisdiction over the year 1969. See Section 6213(a) of the Code; *Kennedy* v. *Commissioner,* 339 F. 2d 335 (C.A. 7). The fact that a notice of deficiency subsequently was issued for 1969 did not cure the jurisdictional defect in the petition. *Kennedy* v. *Commissioner, supra, 339 F.2d* at 337. Although appellant could have obtained review of the deficiency determined for 1969 had he filed a petition in the Tax Court within 90 days of his receipt of the deficiency notice for that year, he failed to take such action. Accordingly, the Tax Court had no jurisdiction over the year 1969. *Page* v. *Commissioner,* 297 F.2d 733 (C.A. 8).

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